ATTACHMENT U

Internal Government Processes Section
in Vol. I, Governor's Committee Report

Internal Government Processes

Internal Correspondence and Memoranda
Departmental Procedural Manuals
Attorney-Client Privilege
Withholding of Documents in Preparation for Legal Action
Attorney Work Product
Potential Real Estate Purchases
Collective Bargaining Material
Access to Opinions of State Experts

One of the areas of greatest tension in any review of public records law involves the internal processes of government and the records that accompany such processes. On one hand, government is a public institution and therefore must be accountable to the public. This requires access if any real effort is to be made to monitor the actions of government officials.

On the other hand, the public also has a right to expect public institutions to perform efficiently and effectively. And in order to do so, public institutions like all institutions have certain needs -- to freely communicate internally, to be able to confidentially formulate strategy and then take actions in a competitive environment, and to obtain and receive best possible professional advice.

This dilemma, to be both a public institution open enough to be monitored and an institution which is capable of efficient and effective action, will exist regardless of what decisions are made on government records. There is no question, however, that decisions about records can have a substantial impact on the functioning of government.

The first issue concerns the availability of internal correspondence and memoranda and raises all of the problems that were just discussed. These materials are not currently viewed as public records by government officials under Chapter 92, HRS, though there are records which the courts have opened up on an individual basis. This view was espoused by Honolulu Managing Director Jeremy Harris (II at 116) and undoubtedly reflects the views of most agencies. The ability to share views internally and to have those views be candidly expressed is critical. If, however, this material is likely to be made public, its character is likely to change dramatically. If officials are worried more about how others will later read their work than they are about making the tough recommendation or taking the strong stand, the internal communication could become so wishy-washy as to be of little value.

On the other hand, as one of the Committee members pointed out, these internal communications demonstrate the decision-making process of the government and thus are important to those wishing to monitor the actions of government.

On a somewhat related point, the status of departmental procedural manuals is also the subject of dispute. Here, however, the question is complicated even further by the rule-making requirements of Chapter 91, HRS. Under Chapter 91, agencies must adopt as rules any policies and guidelines which impact on the public. The line between a manual which applies only to internal matters and matters which should be in rules can be a very difficult one to establish. During the course of the Committee's work, a dispute arose between the Department of Human Services (DHS) and the Legal Aid Society of Hawaii (LASH) (II at 86 and III at 329) over such a manual. DHS, through its Deputy Attorney General, argued that the manual dealt only with internal matters and that it only involved implementation not interpretation. LASH, on the other hand, argued that the manual should have been adopted as rules. The dispute has to some degree been resolved by the manual being provided to LASH by DHS. Nonetheless, the basic dispute is still unresolved.

On the more basic issue of the manuals, however, there still remains the need to balance the interference with the functioning of government and the need to monitor the functioning of government. It does appear that in the case of manuals, there may be somewhat less concern about their release than about release of the memoranda discussed previously, only because these manuals presumably deal with more general subjects. Nonetheless, the basic arguments from the previous section still apply.

The next issue is that of attorney-client privilege. As Hawaii Corporation Counsel Ronald Ibarra (II at 137) notes, communications between his office and the departments advised by his office are privileged. The Attorney General's Office shares this view, a fact which Desmond Byrne (II at 317 and I(H) at 57-59) found troubling. In Mr. Byrne's view, the Attorney General's Office should represent individual citizens in addition to (or in lieu of) the agencies.

This question is essentially settled by statute (Section 28-4, HRS) and unless that is changed, the attorney-client privilege runs between the Attorney General and the departments and agencies of the State. Communications between the two are therefore privileged. On the other hand, the agencies (as the clients) are free to waive this privilege and to release any and all advice provided it by the Attorney General's Office.

It should be remembered in discussing this issue that the attorney-client privilege, while codified in Chapter 626, HRS (Rule 503), is not so much a creation of statute as it is a judicial creation. Its presence is considered crucial to the proper functioning of our legal system. Any changes to that provision should therefore be handled with great care.

On a closely related issue, there has been substantial dispute over the withholding of documents in preparation for legal action. This is an exception to the current public records law which is contained in Section 92-51, HRS. The issue raised before the Committee arose out of a dispute between the Hawaii Corporation Counsel and the Native Hawaiian Legal Corporation (NHLC). The former was represented by both Corporation Counsel Ronald Ibarra (II at 137) and Deputy Corporation Counsel John Wagner (I(H) at 23-26). The latter by Mahealani Ing (II at 281 and I(H) at 37-39).

The view of NHLC, which appears consistent with a literal reading of the statute, is that once the action is commenced, material should be available without the need to rely on formal judicial discovery procedures. In NHLC's view, it is very clear that material cannot be withheld during litigation.

The Corporation Counsel's view is not entirely clear but appears to focus on the following points: that this is an important provision to retain even if the records laws changes; that abuse of this provision is possible if records are sent to the attorneys just to hide them; and that those seeking such records should have to use judicial discovery rules.

Without attempting to settle the particular dispute in the Big Island case, it is worth noting that neither side disputes the value of the provision. If the provision is to be continued, however, what happens when litigation is commenced and whether judicial discovery procedures must be used to get information should be clarified.

Finally, as one of the Committee members noted, if the document withheld is normally one which would be a public record, it should not be withheld. At a minimum, there should be a limit on the withholding of such documents. In the case of these records, they would presumably be available no later than when the litigation is commenced and judicial discovery rules will not need to be employed.

On a related note is the treatment to be accorded attorney work-product. Attorney work-product are the records created by the attorney such as notes on the case or prepared at the attorney's direction in preparation for trial. Under the Rules of Evidence, this material is priviledged. This material

is tied to the attorney-client privilege, and its confidentiality is viewed as critical to the judicial system. At this point, there appears to be no dispute that such material is confidential as was pointed out by Deputy Prosecutor Arthur Ross (II at 132). It may, however, be appropriate to codify the acceptance of the work product rule within the records laws.

In this context, one Committee member raised the possibility that the last two concepts could be read together; that the only documents that could be withheld pending litigation are those considered attorney work-product. This interpretation will likely face substantial opposition as interfering with the sound preparation of legal action.

The Committee was presented with two issues which involve the need for confidentiality by the agency at early stages though not a later stage. The first of these is discussions relating to potential real estate purchases or eminent domain cases. If for no other reason than the protection of public funds, information of this kind must remain confidential until a specified decision has been made and the purchase or eminent domain cases commenced. Honolulu Managing Director Jeremy Harris (II at 116) also believes that appraisals, engineering, and feasibility studies should also remain confidential.

Once the decision is made, however, the decision should be a matter of public record. If eminent domain is involved, it will of course be a public judicial process. One Committee member argued that in all other cases, the tentative accord should be public so that it can be reviewed by others.

The second issue involves collective bargaining material. In most cases, each side must be able to keep its position confidential if bargaining is to be a meaningful activity. In this context, Harris (II at 116) would also add strike plans.

Once the negotiations are complete, the contract itself is a public document as are the costs associated with it since both must be presented to the Legislature.

In both of these cases, real estate purchases and collective bargaining, the current law does not provide a clear exemption. They have always been handled on a confidential basis but it would probably be preferable to provide explicit authority for such treatment.

The final issue involves access to the opinion of State experts. It was raised by Earl Neller, an archaeologist with the Office of Hawaiian Affairs (II at 376 and I(H) at 55). It is his view that the public should have full access to opinion of State experts and should be able to find out what the experts are working on. He indicated that his experience is that State administrators require that such access be cleared by them and that they otherwise intimidate and coerce State experts.

This is a difficult issue to address because these opinions appear in many forms and their treatment probably depends on the form in which it is provided to the agency. To the extent that the opinions of State experts are contained in internal memoranda, the discussion that began this section is applicable. To the extent that the opinions arise in another form, they may be completely public. Another way to approach the same concerns is to view Neller's concerns not in terms of State experts as a class but in terms of historic preservation as a subject. That will be done in a later section.